Tel Data Corporation *and* Dale Frederick *and* Sherry J. Scott *and* Russell T. Anderson. Cases 26–CA–14904, 26–CA–14970, and 26–CA–14997

October 27, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On March 4, 1994, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent, the General Counsel, and Charging Party Sherry Scott filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

The judge recommended, inter alia, dismissal of certain complaint allegations regarding the Respondent's distribution of a new employee handbook, issuance of a written out-of-town van policy, discharge of employee Sherry Scott, and a statement that nonmembers of the Union could not file grievances. For the reasons set forth below, we disagree with the judge on these issues.

The Respondent is in the business of installing electronic communication systems in retail stores throughout the country. Since 1979, the Respondent and the Union have been parties to successive collective-bargaining agreements.

On October 24, 1991,[4] Union President Jesse Parrish requested a grievance meeting with the Respondent to discuss the Respondent's failure to provide benefits required by the contract. At a meeting on November 1, the Respondent agreed to honor the contract, and no further action was taken on the grievance.

On December 13, the Respondent conducted a meeting of employees at its headquarter offices in Nashville. At the meeting, Respondent President John Griffin announced that he knew at least eight employees had contacted the Union and that ''since all this union crap has come up,'' there were going to be some changes. Griffin stated that the union contract was being shoved down his throat, and warned employees that they could not have it both ways—if the Respondent had to adhere to the particulars of the contract, then any benefits not specifically required by the contract would be eliminated. Griffin also told employees that he could fire them, close the company, and reopen under another name.

Vice President Phillip Tournaud also addressed the employees. He stated that employees who signed dues authorization forms would be members of the Union, would be eligible to work on more jobs, and would get three more holidays than those who did not join the Union.[5]

Following the meeting, employees were issued, for the first time, an employee handbook. The handbook provisions eliminated certain benefits that the Respondent had been providing, including the ''on-call'' pay of $118 per week for local employees, the option of driving company vehicles to and from work, and the option of out-of-town employees to claim actual expenses in lieu of a per diem allowance. The handbook also contained the Respondent's November 19 policy restricting out-of-town van use, and the November 18 policy restricting the use of company telephone credit cards.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct certain errors in the judge's decision. In sec. III,C,3, we note that Dale Frederick was informed that he should return to Nashville on January 21, 1992, rather than 1993; and in sec. III,C,2, the memorandum regarding out-of-town van use was dated November 19, 1991, not 1992 as stated in the decision.

[2] The judge inadvertently omitted from the conclusions of law his finding that the Respondent violated Sec. 8(a)(3) and (1) by changing its telephone credit card policy to retaliate against employees for engaging in protected activity.

[3] No exceptions were filed to the following findings of unlawful conduct: (1) the Respondent violated Sec. 8(a)(1) by telling employees that they would receive three additional holidays and be able to work on certain jobsites only if they joined the Union; (2) the Respondent violated Sec. 8(a)(2) and (1) by paying union dues on behalf of employees without deducting such amounts from the employees' wages; and (3) the Respondent violated Sec. 8(a)(5), (3), and (1) by withdrawing the option of out-of-town employees to claim actual expenses instead of per diem, and by eliminating on-call bonus pay for local employees; and (4) the Respondent violated Sec. 8(a)(3) and (1) by assigning employee Russell Anderson more onerous work.

We modify the judge's remedy to provide for computation of lost earnings or benefits as a result of the Respondent's failure to abide by the terms and conditions of the collective-bargaining agreement, as prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] All dates are in 1991 unless otherwise indicated.

[5] The judge found that Vice President Tournaud's statement that employees were required to join the Union in order to get three additional holidays, and to be able to work on certain jobs, violated Sec. 8(a)(1). The General Counsel has excepted to the judge's failure to find that this requirement also violated Sec. 8(a)(2). We agree with the General Counsel that requiring employees to join the Union in order to receive additional benefits constitutes unlawful support of a labor organization within the meaning of Sec. 8(a)(2) of the Act. See *Vic's Shop 'N Save*, 215 NLRB 28, 33 (1974).

1. We agree with the judge, for the reasons stated in his decision, that the distribution of the employee handbook at the December 13 meeting, without notice to the Union and without giving the Union an opportunity to bargain, violated Section 8(a)(5) and (1). For the reasons stated below, however, we find, contrary to the judge, that the issuance of the employee handbook also constitutes a separate violation of Section 8(a)(3) and (1).

The employee handbook announced policies that significantly reduced the benefits employees had previously enjoyed, and was issued soon after the employees protested the Respondent's failure to comply with the terms of the contract. Indeed, as Griffin explained at the December 13 meeting, if the Respondent had to adhere to the particulars of the contract, then any benefits not specifically required by the contract would be eliminated. The judge himself found that several of the policy changes announced at the December 13 meeting and included in the handbook were discriminatory. The Respondent had never before issued an employee handbook and clearly did so at the December meeting as one more element of its plan to retaliate against employees for their protected grievance activity. Under these circumstances, we find that the issuance of the employee handbook violated Section 8(a)(3) and (1) of the Act.

2. The judge found that the Respondent did not violate Section 8(a)(5), (3), or (1) when, on November 19, it announced new rules on the use of company vans by out-of-town employees. The judge found that the November 19 written policy was not different from the existing unwritten policy and thus did not constitute a unilateral change. The judge found that prior to November 19 the Respondent had a ''don't ask, don't tell'' policy with respect to the personal use of company vans on weekends, but that this policy was not unlimited.

In excepting to the judge's findings, the General Counsel maintains that the November 19 van policy placed new restrictions on employees, and that the restrictions were implemented in response to the employees' union activity, without notice to the Union and without affording the Union an opportunity to bargain over the change.

We agree with the General Counsel that the van policy announced November 19 was more restrictive than the previous policy, and that it was instituted both unilaterally and in retaliation against the employees' protected activity.

It is undisputed that at all relevant times the Respondent assigned company vans to employees for use in getting to and from their out-of-town jobsites, and for carrying tools and equipment. Prior to November 19, employees were also permitted to use company vans on their weekends and days off. The record shows that employees regularly used company vans on weekends to go deer hunting, fishing, camping, snowmobiling, visiting relatives, and sightseeing, often traveling great distances to their destinations. Employee Neal Ingram testified that he drove the van on a 1-week trip from his jobsite in Texas to Arkansas, and then back to Texas. Prior to this trip, Ingram informed Tournaud of his vacation plans and was told to have a good time. On many occasions, employee Keith Bolton drove a company van from his jobsite in Gainesville, Florida, to his parents' home in Valparaiso, Florida. Employee Dale Frederick testified that, with Supervisor Steve Cowell's knowledge, he used a company van for 1 week to go hunting. He also drove the van from his jobsite in Minnesota to his home in Michigan for a 1-week visit, and then drove it back to Minnesota. Frederick also went in a company van on a camping trip with another employee to the Grand Canyon. Frederick testified that he told Cowell where he was going ''most of the time,'' and was never told that the Respondent had a problem with his vacation plans. Supervisor Rick Nelson credibly testified that he never restricted his employees in the use of company vans on their days off, and that he was never instructed to restrict employees' van use. Nelson testified that it was ''normal procedure'' for employees to take the vans with them if they had time off between jobs, rather than leave them at a remote jobsite.

On November 19, the Respondent issued, for the first time, a written policy concerning the use of company vans by out-of-town employees during their nonworktime. The policy states, inter alia:

> Employees can drive company vans a reasonable distance from job sites for meals, shopping for necessities, etc. and, of course, to hotels/motels for lodging purposes. A reasonable distance depends on many factors including, but not limited to, the size of the city where work is ongoing, availability of lodging, restaurants, etc. Reasonable judgment is to be exercised, and when in doubt the employee is to seek approval from his supervisor on what the company considers reasonable.
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> . . . .
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> Any use of company vans other than those covered in this policy requires approval in advance by the employee's supervisor for each and every time an exception to this policy is permitted.

We conclude that the above policy announces new restrictions on the employees' use of company vans. Prior to this policy, there was never a requirement that employees obtain the advance approval of their supervisor to use company vans on their nonworktime, including trips beyond a ''reasonable distance'' from their jobsites. Indeed, the Respondent had never communicated any restrictions to employees and, as the

judge noted, maintained an unspoken ''don't ask, don't tell'' policy.[6] The record shows that no employee had ever been denied the use of a van based on the ''reasonable distance'' limitation, even when the Respondent was aware that the employee would be driving the van a substantial distance from the jobsite.

We further find that the General Counsel made a showing sufficient to support the inference that the restrictive van policy was promulgated in response to employees' protected conduct.[7] The Respondent's president told employees at the December 13 meeting that changes were being made because employees had complained to the Union about the Respondent's failure to abide by the contract. The Respondent also demonstrated considerable union animus, as found by the judge, by unlawfully eliminating other employee benefits that were not specified in the contract, and by threatening employees with discharge and plant closure, because the employees engaged in protected activity.

We further find that the Respondent has not met its burden under *Wright Line* of demonstrating that it would have issued the new van policy even in the absence of the employees' protected activity. In the Respondent's brief in support of exceptions, the Respondent asserts that ''Griffin determined to limit the use of vans on out of town jobs as well as to terminate the privilege of driving vans home by local employees'' based on information received in August from the Respondent's insurance carrier regarding worker's compensation liability. Despite the liability concerns raised in August, the Respondent did nothing to correct the perceived problem until November 19, just a few weeks after the first grievance meeting.[8] Under these circumstances, we find that the Respondent issued the new van policy in retaliation for the employees' protected conduct, without notice to the Union and without affording the Union an opportunity to bargain, thereby violating Section 8(a)(5), (3), and (1).

On November 25, employee Sherry Scott was discharged for ''unauthorized use of a company vehicle.'' After completing work in Jacksonville, Florida, on Friday, November 15, Scott drove the company van to Myrtle Beach, South Carolina. When Scott returned to Nashville on November 25, he was informed that he was terminated for taking the van 750 miles[9] from the jobsite without permission. By discharging Scott pursuant to the unlawfully implemented van policy, the Respondent further violated Section 8(a)(5) and (1).[10]

3. On January 17, 1992, Vice President Tournaud met with Union Representative Parrish and employees Russell Anderson and Mike Brown to discuss a grievance filed by the two employees. At the beginning of the meeting, Tournaud asked Parrish whether Brown was a member of the Union. Parrish responded that it did not matter. Tournaud, in a hostile tone, insisted that Brown was not a member of the Union because he was not having dues deducted, and thus he could not file a grievance or be represented by the Union. Parrish explained that Brown had paid his dues directly to the Union, and that regardless of dues, he had a right to be represented by the Union. The grievance was denied and no further action was taken on it.

The judge found that Tournaud's ''erroneous remark'' to Brown that he could not file a grievance and be represented by the Union because he did not have dues deducted was not coercive. The judge explained that the remark was made at the beginning of the meeting and was immediately challenged by Parrish, who proceeded to represent Brown on the grievance.

Under the circumstances, we cannot agree with the judge that the Respondent's conduct had no substantial impact on employee rights. Approximately 1 month earlier, at the December 13 meeting, Vice President Tournaud drew the same distinction between union members and nonmembers, stating that members would be entitled to certain benefits not available to nonmembers. Tournaud's comment at the January 1992 grievance meeting shows that the Respondent had not abandoned this unlawful distinction, but was continuing to insist that the contract only applied to union members. Because Tournaud's statement would reasonably tend to interfere with, restrain, and coerce employees in the exercise of their protected right to file a grievance and be represented by the Union, we find that it violated Section 8(a)(1) of the Act.

4. We agree with the judge, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(3) and (1) by discharging employee Dale Frederick on January 23, 1992, because he engaged in protected activity. In reaching this conclusion, however, the judge refused to consider evidence the Respondent discovered *after* Frederick's discharge allegedly indi-

[6] We find no record evidence to support the judge's assertion that the Respondent's supervisors told employees that they could use company vans within a 200- to 300-mile area of their work assignment without obtaining a supervisor's specific permission.

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[8] The Respondent's contention that it limited the use of vans in response to liability concerns is also inconsistent with the Respondent's assertion that the November 19 policy did not constitute a ''change.''

[9] In fact, Myrtle Beach, South Carolina, is 333 miles from Jacksonville, Florida. Rand McNally Mileage Guide, 1993.

[10] *Kysor Industrial Corp.*, 307 NLRB 598, 603 (1992). We shall modify the judge's recommended Order to require that the Respondent offer Scott immediate and full reinstatement, and make him whole for any loss of pay and benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

cating that Frederick had overreported 8 hours on his timecard for December 3. The judge disregarded this evidence because he found that the alleged overreporting, which the Respondent asserts would have led to Frederick's discharge even absent his protected activity, was admittedly not known to the Respondent at the time of its decision to discharge Frederick. The Respondent excepts to this finding and maintains that Frederick's alleged misstatement of his time ''justifies'' his discharge.

Although the judge was correct in finding that the timecard incident is not relevant to the issue of whether Frederick was unlawfully discharged, the Respondent's evidence nonetheless must be considered in determining whether Frederick is entitled to reinstatement and full backpay. Under Board precedent, ''if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct.'' *Marshall Durbin Poultry Co*., 310 NLRB 68, 70 (1993), citing *John Cuneo, Inc*., 298 NLRB 856, 856–857 (1990), and *Axelson, Inc*., 285 NLRB 862, 866 (1977).

Applying this precedent, we conclude that the Respondent has not satisfied its burden. Contrary to the Respondent's contention, the record shows that the Respondent encouraged under- and overreporting of hours during periods when employees worked irregular workweeks. Employee Ingram testified that on several occasions when he turned in overtime, Supervisor Cowell directed him to take a few days off the next week and then changed Ingram's timecard to reflect 40 hours worked each week. Cowell admitted that he instructed employees to record 40 hours on their timecards when in fact they did not work a 40-hour schedule.

The record also shows that the hours Frederick allegedly ''overreported'' were hours spent traveling to his jobsite in Minnesota. It is undisputed that the Respondent permits employees to report the time spent traveling to and from their jobsites, including time delays that were not the fault of the employee, such as mechanical problems with the van. Frederick left for his jobsite on Monday, December 2,[11] and was delayed in Wisconsin on December 3 because of a snowstorm. On December 4, he arrived at the jobsite and began working. Thus, on Tuesday, December 3, the date Frederick is accused of overreporting hours, he was in fact traveling to the jobsite, time for which employees are normally compensated.

It is also undisputed that employee Joey Green, Frederick's partner at the time, was caught in the same snowstorm and, like Frederick, did not begin working on the job until December 4. Despite the fact that Green also claimed 40 hours for the workweek, including the weather delay, Green was not investigated by the Respondent or accused of ''stealing'' time.

Based on the foregoing, it is clear that the Respondent treated Frederick in a disparate manner and did not satisfy its burden of establishing that it would have discharged any other employee for the same conduct. Accordingly, Frederick is entitled to reinstatement and full backpay.

[11] Frederick took personal leave on December 2.

ORDER

The National Labor Relations Board orders that the Respondent, Tel Data Corporation, Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits because they engage in union or other protected activity.

(b) Threatening employees with business closure and loss of employment because they engage in union or other protected activity.

(c) Informing employees that they cannot file grievances or be represented by the Union if they are not members of the Union.

(d) Telling employees they will not receive additional benefits or be able to work on certain jobsites unless they join the Union.

(e) Promising employees benefits if they refrain from engaging in union or other protected activity.

(f) Assisting the Union by requiring employees to join the Union in order to be eligible for three additional holidays and to work on certain jobsites.

(g) Assisting the Union by paying employees' union dues out of its own funds without deducting the amount of the dues from the employees' wages.

(h) Issuing employee handbooks to employees because they engage in union or other protected activity.

(i) Discharging, issuing disciplinary warnings to, assigning more onerous work to, or otherwise discriminating against employees because they engage in union or other protected activity.

(j) Restricting the use of company vehicles by out-of-town employees on nonworktime because they engage in union or other protected activity.

(k) Withdrawing the use of company vehicles from local employees for driving to and from the Respondent's facility because they engage in union or other protected activity.

(l) Withdrawing from out-of-town employees the option of claiming actual expenses in lieu of per diem allowance because they engage in union or other protected activity.

(m) Eliminating the on-call bonus pay for local employees because they engage in union or other protected activity.

(n) Restricting its policy regarding reimbursement for phone calls and the use of company telephone credit cards by employees working out of town because they engage in union or other protected activity.

(o) Refusing to bargain with the Union as the exclusive bargaining representative of its employees in the appropriate unit by making changes in the terms and conditions of employment of such employees without first notifying the Union and affording it an opportunity to bargain about such changes.

(p) Failing to continue in effect all of the terms and conditions of employment prescribed in the collective-bargaining agreement.

(q) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dale Frederick and Sherry Scott immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the unlawful conduct against them. Backpay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Remove from its files any reference to the unlawful discharges and warning, and notify the employees in writing that this has been done and that the discharges and warning will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) On request by the Union, reinstate the practice existing prior to November 18, 1991, with respect to reimbursement for phone calls and the use of company telephone credit cards for personal calls, the practice existing prior to November 19 with respect to out-of-town van use, and the practices existing prior to December 13, 1991, with respect to call-in pay, the use of company vehicles for commuting to and from work by local employees, the use of company vehicles by out-of-town employees on their nonworktime, the option of out-of-town employees to claim actual expenses in lieu of per diem, and on-call bonus pay for local employees.

(e) Make whole the unit employees for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful changes in policy described in paragraph 2(d), as prescribed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, supra.

(f) Rescind the employee handbook issued December 13, 1991.

(g) On request, bargain with the Union concerning all proposed changes in terms and conditions of employment of the employees in the appropriate unit.

(h) Post at its facility in Nashville, Tennessee, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with loss of benefits because you engage in union or other protected activity.

WE WILL NOT threaten you with business closure and loss of employment because you engage in union or other protected activity.

WE WILL NOT inform you that you cannot file grievances or be represented by the Union if you are not members of the Union.

WE WILL NOT tell you that you will not receive additional benefits or be able to work on certain jobsites unless you join the Union.

WE WILL NOT promise you benefits if you refrain from engaging in union or other protected activity.

WE WILL NOT assist the Union by requiring you to join the Union in order to be eligible for three addi-

tional holidays and to be able to work on certain jobsites.

WE WILL NOT assist the Union by paying your union dues out of our own funds without deducting the amount of the dues from your wages.

WE WILL NOT issue employee handbooks to you because you engage in union or other protected activity.

WE WILL NOT discharge, issue disciplinary warnings to, assign more onerous work to, or otherwise discriminate against any of you for supporting Local 3879, Communications Workers of America, or any other union.

WE WILL NOT restrict the use of company vehicles by out-of-town employees on nonworktime because you engage in union or other protected activity.

WE WILL NOT withdraw the use of company vehicles from local employees for driving to and from our facility because you engage in union or other protected activity.

WE WILL NOT withdraw from out-of-town employees the option of claiming actual expenses in lieu of per diem allowance because you engage in union or other protected activity.

WE WILL NOT eliminate the on-call bonus pay for local employees because you engage in union or other protected activity.

WE WILL NOT restrict our policy regarding the use of company telephone credit cards by employees working out of town because they engage in union or other protected activity.

WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of the employees in the bargaining unit by making changes in the terms and conditions of employment of such employees without first notifying the Union and affording it an opportunity to bargain about such changes.

WE WILL NOT fail to continue in effect all of the terms and conditions of employment prescribed in the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dale Frederick and Sherry Scott immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful discharges and warning, and notify the employees in writing that this has been done and that the discharges and warning will not be used against them in any way.

WE WILL, on request by the Union, reinstate the practice existing prior to November 18, 1991, with respect to reimbursement for phone calls and the use of company telephone credit cards for personal calls, the practice existing prior to November 19 with respect to out-of-town van use, and the practices existing prior to December 13, 1991, with respect to call-in pay, the use of company vehicles for commuting to and from work by local employees, the use of company vehicles by out-of-town employees on their nonworktime, the option of out-of-town employees to claim actual expenses in lieu of per diem, and on-call bonus pay for local employees.

WE WILL make you whole for any loss of earnings or other benefits suffered as a result of our changes in policy, with interest.

WE WILL rescind the employee handbook issued December 13, 1991.

WE WILL, on request, bargain with the Union concerning all proposed changes in terms and conditions of employment of the employees in the appropriate unit.

TEL DATA CORPORATION

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On charges filed by Dale Frederick, Sherry J. Scott, and Russell T. Anderson,[1] the Regional Director for Region 26 of the National Labor Relations Board (the Board) issued a complaint and consolidated complaint on March 30 and April 20, 1992, respectively, alleging that Tel Data Corporation (the Respondent) committed certain violations of Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Nashville, Tennessee, on September 21 through 23 and October 5 and 6, 1992, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with an office and place of business in Nashville, Tennessee, engaged in the installation and service of communications equipment. During the 12-month period ending December 31, 1991, the Respondent, in the conduct of its business op-

[1] Frederick filed a charge and amended charge on January 30 and February 10, 1992, respectively. Scott filed a charge on March 9, 1992, and Anderson filed a charge on March 25, 1992.

erations, provided services valued in excess of $50,000 directly to customers located outside the State of Tennessee and purchased and received at its Nashville facility goods valued in excess of $50,000 directly from points outside the State of Tennessee. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material Local 3879, Communications Workers of America (the Union), was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent is in the business of installing and servicing telephone and other electronic communications systems and equipment in the Nashville area and in other parts of the country. During 1991,[2] approximately 70 percent of its business involved installations in Target Stores facilities under construction at various sites throughout the country. In most instances, out-of-town installation projects were handled by two-man teams directed from Nashville without an onsite supervisor.

Since 1979, the Respondent and the Union have been involved in a bargaining relationship and have negotiated a series of collective-bargaining agreements for a unit consisting of:

> All apprentices, wiremen, installer-repairmen and senior installer-repairmen, and excluding others and those exempted under the National Labor Relations Act.

Each of the successive agreements contained a union-security clause; however, up until December 1991, the employees covered by these agreements did not sign checkoff authorizations, no dues were deducted from their pay, and their dues were paid for them by the Respondent. Supervisors gave the employees union identification cards which they were instructed were to be used to get on union jobsites. There is no evidence that any unit employee was involved in the negotiation of any of the agreements. For at least the last 5 years prior to 1991, there were no union stewards appointed, no grievances were filed, and there is no evidence any employee ever received a copy of a contract. In the spring of 1991, the Respondent decided to institute a drug testing policy and negotiated with the Union a memorandum of agreement, effective June 1, which implemented the policy. At about the same time, employee Russell Anderson obtained a copy of the current collective-bargaining agreement from Union President Jesse Parrish.

In October, employee Dale Frederick also obtained a copy of the contract from Parrish. After reading it, Frederick felt that the employees had not been receiving certain of the benefits provided in the contract and contacted Parrish about it. He came to Nashville over a weekend to discuss the contract provisions with Parrish. He also showed the contract to some of the company employees and urged them to contact Parrish about it. Thereafter, Parrish wrote to the Respondent requesting a grievance meeting to discuss the disputed provisions, which was held in early November. Parrish issued a report concerning the results of the grievance meeting to the employees and no further action was taken.

B. *The 8(a)(1) Allegations*

1. Statements at the meeting on December 13

The evidence shows that for some time prior to December 1991 the Respondent did not strictly adhere to the provisions of the collective-bargaining agreements then in effect. In some instances it did not provide all of the benefits spelled out in the contracts, but at the same time it provided certain benefits not called for there. Following the November grievance meeting, the Respondent determined that it was going to follow the provisions of the contract. On December 13, it so informed the employees at a meeting held in a Nashville hotel. The complaint alleges that certain statements made at that meeting by Company President John Griffin and Vice President Phillip Tournaud violated Section 8(a)(1).

Russell Anderson testified that Griffin began the meeting by telling how well the Company had done that year compared to 1990 and explained the profit-sharing program. He said that he knew that at least eight employees had contacted the Union and that ''since all this union crap has come up,'' there were going to be some changes made. He said that since the Union was being shoved down their throat, they would adhere to the particulars of the contract. There were a lot of things the Company had done that were not included or bargained for that would no longer be done. Later in the meeting Tournaud informed the employees that the Company would no longer pay their union dues for them and they would have to be deducted from their pay. He said that those employees who signed dues-deduction authorizations would be members of the Union and would get three more holidays than those who did not. He also said that employees who were not members of the Union could not be assigned to out-of-town jobs that required union membership.

Dale Frederick testified that Griffin began by saying how profitable the Company's year had been, how wages had increased that year, and discussing the profit-sharing plan. He said that Griffin got upset and said if he had known about ''the union stuff'' he never would have started the plan. He said that since the union contract had been shoved down their throats they were definitely going to go by the contract. He also said that he could close Teldata's doors tomorrow, fire everyone there, and reopen as a new company. When Tournaud spoke he said they would have to sign dues-checkoff authorization forms because the Company would no longer be paying their union dues. He said he wasn't telling anyone to sign but if they did not they might not be able to work on an out-of-town job that was Union and they would have to get someone who could. Tournaud said that those who signed the authorizations would get three additional holidays and those who did not would not get them.

John Griffin testified that he began by discussing the Company's performance during the year and how well the profit-sharing plan would do. He said that he told the employees that he knew the subject of the Union was on everyone's mind and that the Union was alleging that the Company was not doing certain things under the contract. He said

[2] Hereinafter, all dates are in 1991 unless otherwise indicated.

that he attempted to explain that while they might not have done everything the contract said, on balance they had provided far more than a literal interpretation required. He said that they could not have it both ways, they could not expect the Company to do all these things outside the scope of the contract and then press it to do everything that was in it. From that day forward they would honor the contract to the letter. He said he did not recall saying the contract was being shoved down his throat, only, that if they were going to have to honor the contract to the letter, don't expect us to do all these other things at the same time. He said he did not recall making a statement about closing Teldata but did say that a large portion of their work with Target Stores was union and if they did not have a viable union relationship, they might have to subcontract the union projects and that might result in layoffs.

Phillip Tournaud testified that he spoke at the meeting only in response to questions, that he was repeatedly asked if employees should sign the checkoff authorization cards, and that he told them everyone had to make his own decision. When asked about holidays, he told the employees that those that were members of the Union would get the holidays the contract provided and nonmembers would continue to get what they were getting. He was present when Griffin spoke at the meeting, that he said only that they found that they were not in full compliance with the contract on some items, and that they would change in order to adhere to all items of the contract. Griffin did not say anything about closing Teldata.

Analysis and Conclusions

I find that the credible and mutually corroborative testimony of Anderson and Frederick establishes that Griffin told the employees they were going to lose certain benefits the Company was providing, apart from those specified in the collective-bargaining agreement, because of the insistence that it comply with all of the terms of the agreement, which he characterized as shoving it down his throat. I also credit the testimony of Frederick that Griffin told the employees that he could fire them, close the Company, and reopen under another name in retaliation for their protected activity. Tournaud admitted telling the employees that they would get additional holidays if they were members of the Union and did not deny the credible testimony of Anderson and Frederick that he said failure to join the Union would result in their inability to work on certain union jobsites and replacement by someone who could.

Griffin's statement that the employees' benefits would be reduced because of the insistence on compliance with the terms of the contract was clearly coercive and a violation of Section 8(a)(1). *Marcus Management*, 292 NLRB 251, 262 (1989). His statement that he could close the business and fire the employees was a blatant threat to retaliate against them because they engaged in protected activity and violated Section 8(a)(1). *Almet, Inc*., 305 NLRB 626, 634 (1991). The rights of the employees protected by Section 7 of the Act include the right to refrain from union membership. Tournaud's comments that indicated failure to join the Union would result in adverse consequences were coercive and tended to interfere with those rights and violated Section 8(a)(1).

2. Statement by Steve Cowell

Dale Frederick testified that on the Monday following the December 13 meeting, in order to prepare certain grievances he intended to file, he telephoned Supervisor Steve Cowell and asked several questions concerning provisions in the contract he felt were being violated. He informed Cowell that he was writing down the answers and would give them to Parrish and they would have to meet about it. In response, Cowell said that it did not have to go like this, that Frederick didn't need to do this, and that he did not need to keep this up. Frederick said that he felt he did not have a choice but to proceed with the grievances. Cowell said, if he stopped, everything would get back to normal and they could end this. Frederick said that he had told people he would finish this and he was going to do so. Steve Cowell testified that he remembered the telephone conversation with Frederick on December 16 in which he was asked about the Company's interpretation of the contract, but that he did not recall telling him that it doesn't have to be this way and did not tell him if he stopped things would get back to normal.

Analysis and Conclusions

I credit the testimony of Frederick as he appeared to have a much better recollection of the conversation than Cowell who said he could not say exactly what was said. Also, I find that his answers to leading questions by counsel for the Respondent, which did not exactly restate Frederick's testimony about what was said during the conversation, do not contradict Frederick. By telling Frederick, in the context of a discussion about grievances he was proposing to file, that he should abandon the grievances and things would get back to normal, Cowell was attempting to discourage Frederick from engaging in protected activity in violation of Section 8(a)(1). *Escada (USA), Inc*., 304 NLRB 845, 850 (1991); *Ernst Enterprises*, 289 NLRB 565, 566 (1988).[3]

C. *The 8(a)(1) and (3) Allegations*

1. Changes in working conditions

As noted above, after Parrish contacted the Respondent about the employees' complaints that it was not providing all of the benefits provided for in the contract, it made a decision to stop certain noncontractual benefits it had been providing. The contract provided that employees working out of town for more than 1 week could make telephone calls not to exceed $6 per week at company expense. However, the evidence establishes that, in practice, employees were told

[3] In her posthearing brief counsel for the General Counsel has moved to amend the complaint to allege that the Respondent violated Sec. 8(a)(1) by conducting an unlawful poll by requiring employees who did not sign dues-deduction forms to sign a form in the new employee handbook indicating they do not choose to join the Union or have dues deducted. Although it is stated that the alleged violation first became known when the handbook was produced at the opening of the hearing pursuant to subpoena, it appears that the employee handbook was available to the General Counsel before issuance of the original complaint, which alleged, inter alia, that the issuance of the handbook violated the Act. Moreover, I find no reason why a motion to amend the complaint could not have been made prior to the conclusion of the hearing and that under the circumstances it would be unfair to permit this amendment.

that they could charge up to $40 of personal calls per month and that they often exceeded that limit without being asked for reimbursement. On November 12, the Respondent issued a memo informing employees that, effective November 18, company telephone credit cards could not be used to charge personal calls and out-of-town employees would be allowed to claim an allowance of $6 per week for such calls.

At the meeting on December 13, the employees were given an employee handbook for the first time. Through the handbook and announcements made at the meeting the employees were informed of certain policies which, it is alleged, made changes in their working conditions. Effective January 1, 1992, the ''on-call pay'' of $118 per week for local employees who were on-call was abolished, local employees were no longer allowed to drive company vehicles to and from work, out-of-town employees could no longer claim actual expenses in lieu of the standard allowance of $51 per day, employees were informed that all would be expected to do out-of-town work, and out-of-town employees had to obtain permission before driving a company vehicle out of the immediate area of their job assignment. At the meeting the employees were also told that there had been too much overtime worked during 1991 and that it would be reduced in the future.

Analysis and Conclusions

I find that the evidence does not establish that the Respondent withdrew the use of company vans by out-of-town employees on nonworkdays, as alleged in the complaint. As will be discussed below in connection with the discharge of Sherry Scott, I find the provisions in the handbook distributed on December 13 did not change the existing policy. I find that the evidence does not establish that the statement by Griffin at the December 13 meeting that there had been too much overtime worked during the year and it was going to have to stop was an act of discrimination. Apart from the statement, which appears to have been made in the context of a discussion the Company's financial state and was unrelated to the announcement of changes in policy being made as a result of the employees' having complained to the Union, there is nothing to establish that overtime was in fact reduced or that it was done as an act of retaliation. I also find that the issuance of the employee handbook, which served to implement certain of the discriminatory changes was not a separate violation of Section 8(a)(3).[4]

I do find that by rescinding the use of company telephone credit cards for personal calls and reducing the amount of personal calls for which employees could claim reimbursement to $6 per week, by removing the use of company vans by local employees traveling to and from work, by withdrawing from out-of-town employees the option of claiming actual expenses instead of $51 per diem, and by eliminating on-call bonus pay for on-call employees, the Respondent significantly reduced benefits the employees had previously enjoyed. At the meeting on December 13, Griffin informed the employees that the Respondent was making these changes because they had complained to the Union about its failure to abide by the contract. The Respondent's actions in making these changes, for the reasons stated by Griffin, were inherently discriminatory and violated Section 8(a)(1) and (3) of the Act. *Henry Vogt Machine Co*., 251 NLRB 363, 364 (1980).

With respect to the changes in the policies relating to telephone credit cards and the use of vans for local commuting, the Respondent did attempt to show that they were motivated by nondiscriminatory concerns; consequently, the evidence must be considered according to the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Employer's decision. Once that is done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected conduct on the part of its employees.

The record contains clear evidence of union animus on the part of the Respondent. In addition to the violations of Section 8(a)(1) found here, the evidence establishes that in June, during negotiations over the Respondent's attempt to institute a new drug testing policy, Tournaud asked Parrish if Russell Anderson had ''instigated all this shit,'' meaning, getting the Union involved and when Parrish said he was considering making Anderson a union steward, Tournaud threatened to fire him if he was appointed. In April or May, Supervisor Cowell told employee Neal Ingram that Anderson had put his job in jeopardy by making a complaint to the Union. There was credible testimony from Nicki Scott, the wife of employee Sherry Scott, that on an occasion when she had come to pick up her husband at work she was conversing with Tournaud and mentioned that her sister was a union member. Tournaud said, ''we don't talk about unions around here,'' abruptly terminated their conversation, and walked away.

The timing of an action can be persuasive evidence of an employer's motivation. *Limestone Apparel Corp*., 255 NLRB 722, 736 (1981). The change in the telephone credit card policy took effect shortly after the November 1 grievance meeting concerning the Respondent's alleged failure to comply with all aspects of the contract. The change in policy concerning the use of company vans by Nashville employees was announced on December 13 along with the other policy changes which the Respondent attributed to the Union's insistence on full compliance with the contract. I find the evidence is sufficient to create an inference that these policy changes were motivated by the Respondent's desire to retaliate against the employees for seeking to obtain full compliance with the contract.

While not discussed in its posthearing brief, the Respondent denies having committed any violation of Section 8(a)(3) and apparently contends that its changes in policy were economically motivated. Griffin testified that, during a manage-

[4] Insofar as it is contended that issuance of the handbook implemented a discriminatory change in working conditions by stating that all employees were expected to do out-of-town work under certain circumstances, I find the evidence does not establish this to be a material and substantial change since it appears that all employees had done such work at one time or another. With respect to the contention that it changed the policy concerning providing out-of-town employees with a paid trip home after 3 weeks, I find this was not a change inasmuch as it was consistent with the Respondent's position in its dispute with the Union as to the correct interpretation of the applicable contract provision.

ment retreat in October, he became aware that employees were making a large number of credit card calls. When he returned to the office he reviewed the recent bills and was ''astounded at the volume of calls.'' At the grievance meeting on November 1, he mentioned this to the union representatives and told them that it had to stop, that the contract specified $6 per week for personal calls, and that if the Company had to adhere to the terms of the contract so did the employees. A memorandum, dated November 12, was issued to all credit card holders informing them that company credit cards could only be used for business purposes and that the Company would pay an allowance of $6 for calls made by out-of-town employees. Although in his testimony Griffin referred to an analysis of the employees' telephone charges he had done by an independent accountant, it was not completed until after the credit card policy was changed and could have had no bearing on the Respondent's decision. There was evidence that on occasions prior to October, the Respondent had determined that certain employees had been guilty of exceeding the $40 per month limit on telephone credit card charges; however, the policy was not changed, none was required to repay the excess, and the only disciplinary action taken was that, in at least one instance, an employee's card was taken away. I find the evidence fails to establish that the telephone credit card policy was changed for any reason other than that which Griffin informed the union representatives on November 1, viz, that if the employees insisted on the Respondent complying with the contract, any additional benefits it was providing would be revoked.

The Respondent apparently contends that permitting local employees to drive company vans to and from work was not meant to be a benefit to them. Whether it was intended to be or not, allowing the employees to do so it was beneficial to them and they obviously considered it so. Griffin gave testimony about being concerned about being liable for workmen's compensation claims by employees who were driving company vans home at night. However, the correspondence with the insurance carrier he referred to in this regard occurred in July and August, but no action was taken to change the policy until December, when the Respondent announced its other retaliatory changes in policy. In addition there was evidence that after the alleged change in policy, employee Jim Quinn, who had declared his opposition to union representation at the December 13 meeting, was permitted to continue to use a company van to commute to and from work. I find that the Respondent has failed to establish that it would have taken the same action in changing its policy concerning van use by Nashville employees in the absence of its employees' engaging in protected activity. I find both of these changes in policy by the Respondent which in effect revoked benefits enjoyed by its employees were motivated by its desire to retaliate against the employees for engaging in protected activity and violated Section 8(a)(3) of the Act. *Equitable Gas Co.*, 303 NLRB 925, 927–929 (1991); *Lowe Paper Co.*, 302 NLRB 622 (1991).

2. Sherry J. Scott

Sherry Scott was hired by the Respondent in September 1988 to work as an installer in Target Stores facilities throughout the country. He testified that when he was hired he was given a Communications Workers of America (CWA) application which he filled out except for the portion relating to dues deduction. On his second or third day on the job he was given a union card and he received a new card every year. He was told by Cowell that he was to show the card on jobsites if anyone asked to see it. At no time during his employment with the Respondent were union dues deducted from his wages. He was given a company van to use when working on out-of-town jobs and was allowed to use it for a reasonable amount of personal use on weekends.

Scott testified that he had previously worked for several years for South Central Bell whose employees were represented by the CWA and that he had served as a local union president at his hometown of Houma, Louisiana. He knew that he was applying for membership in the Union when he filled out the application when he started with the Respondent and he suspected there was a union contract in existence but he made no effort to obtain a copy. He said that he was told by other employees that a union was not a subject to be discussed at Teldata and doing so could cost him his job. In the summer of 1991, he contacted Jesse Parrish and requested a copy of the contract.

In November 1991, Scott was working in Jacksonville, Florida, and had a company van with him. He finished the job on Friday, November 15, and left on a long scheduled 2-week vacation. He drove the company van, which contained in excess of $20,000 of company equipment, to Myrtle Beach, South Carolina, where on the following day he was involved in a traffic accident. Scott testified that he telephoned Cowell at his home and reported the accident. After being told the details of the accident, Cowell told him not to worry about it and to call Office Manager Joyce Legieza on Monday and to mail her copies of the accident reports. Scott did so and after a week in Myrtle Beach drove the van to his home in Louisiana. He had no further contact with the Company until November 25 when he telephoned Legieza to inquire why his expense check had not been deposited in his bank account. Cowell got on the line and told him he was terminated for unauthorized use of a company vehicle. Scott said he asked Cowell if his discharge had ''anything to do with the turmoil the Company was having with Dale and the Union.'' Cowell said ''absolutely not.''

Scott testified that he filed a grievance over the discharge and he and Parrish met with Cowell, Tournaud, and Supervisor Ricky Nelson on December 9. It was Scott's position that he was discharged for unauthorized use of a company vehicle while other employees were doing the same thing without disciplinary action being taken, that he was not aware that he had done anything wrong, and that he tried to get other employees working in Florida to take the van so that it would be secure but they refused. The result of the meeting was that Tournaud said that the Company stood by the termination. After the meeting ended, Scott, Parrish, and Tournaud met outside the building for about 35 minutes. Scott told Tournaud he felt his firing was unjust and tried to work something out to get his job back. He testified that Tournaud said that Scott's relationship with Dale Frederick was ''definitely a sore point with him'' and that he was really upset that Scott had given Frederick information about who to contact at the Union to file grievances. They also talked about what would be acceptable to Scott. That afternoon he received a telephone call from Parrish who asked him to return to Teldata for another meeting with Tournaud. When they met, Tournaud offered to reinstate him after a 7-

week suspension without pay, but he would also have to sign a letter stating he was totally wrong in what he did and that he was apologizing to the Company. Tournaud said that ''the letter would help him put a stop to the activities at Teldata'' and would ''make an example'' of Scott. He said Tournaud again mentioned his association with Frederick and said while I couldn't tell him not to talk to him, ''it would behoove'' him not to. Scott wanted to discuss the proposal with his wife before making a decision. The next morning he telephoned Parrish and told him he would not sign the letter Tournaud wanted and that the 7-week suspension was excessive. Parrish was unhappy and told him he should accept it but he refused and said he would like to see his case taken to arbitration.

The complaint alleges that the Respondent's termination of Scott was discriminatory and in violation of Section 8(a)(1) and (3) of the Act and that certain statements allegedly made by Tournaud violated Section 8(a)(1). Counsel for the General Counsel contends that the Respondent discharged Scott for a violation of a vehicle-use policy that was not in existence at the time of the incident but was thereafter invented and retroactively applied in order to retaliate against Scott because of his assistance to Frederick in obtaining a copy of the union contract in the summer of 1991.

Analysis and Conclusions

I find that the evidence presented by the General Counsel fails to establish a prima facie case of discrimination against Scott under *Wright Line*, supra, and that if it does, the Respondent has shown that it would have taken the same action even in the absence of protected activity on the part of its employees. A written statement concerning the Respondent's policy on the use of company vans while on out-of-town job assignments was included in the employee handbook distributed at the meeting on December 13. While, as discussed above, I have found that several of the policy changes announced at that meeting and/or included in the handbook were discriminatory, I have concluded that the policy concerning out-of-town van use was neither changed nor discriminatory. Contrary to the contentions of Scott and counsel for the General Counsel, the evidence does not establish that the Respondent changed its policy concerning van use in order to facilitate its termination of Scott or to retaliate against its employees.

The evidence shows that employees working on out-of-town assignments had the use of a company van which they were permitted to use during nonworking hours and on weekends. Prior to November, the Respondent had no written policy concerning the use of these vans. The testimony of various employees and supervisors establishes that the employees were given oral instructions which authorized them to use the vans within a 200- to 300-mile area of their work assignment on weekends without obtaining a supervisor's specific permission. There was testimony about several instances in which employees used the vans while on vacation or over holidays and that, when requested, permission for such use was freely granted, but there is nothing to establish or even suggest that out-of-town employees had unlimited use of the vans for personal use. The incidents described generally involved an employee who took leave in between out-of-town job assignments or used the vans with the knowledge, if not the specific authorization, of his supervisor. In the handbook that was distributed to the employees on December 13, there is a memorandum, dated November 19, 1992, in which the Respondent's policy concerning the use of vans on out-of-town jobs is set forth. It provides, inter alia, that employees may use the vans for personal purposes during nonworking hours and weekends and may drive them ''a reasonable distance'' from the jobsites. What constitutes ''a reasonable distance'' is said to depend on the particular location and ''reasonable judgment'' is to be exercised. In case of doubt, employees are instructed to contact a supervisor to determine what the Company considers reasonable. The memorandum provides that use of the vans other than in accordance with this policy requires advance approval from the employee's supervisor. I find that the evidence fails to establish that this written policy differs in any significant respect from the unwritten policy under which the Company had previously operated for a number of years. I also find there is nothing to indicate that the policy is more restrictive than it had been or that it deprives the employees of any benefit they previously enjoyed. Accordingly, I find that issuance of the written policy concerning the use of vans on out-of-town job assignments was not discriminatory or meant to retaliate against the employees for engaging in protected activity and did not violate Section 8(a)(3).

In order to make out a prima facie case under *Wright Line*, counsel for the General Counsel must establish that the alleged discriminatee engaged in protected activity, that the employer was aware of that activity, and that the adverse action taken by the employer was motivated by union animus. *United Broadcasting Co. of New Hampshire*, 253 NLRB 697, 703 (1980). I find that none of these elements have been established in this case. Although he had previously been a member and a local officer in the CWA and was aware at the time he started with the Respondent that its employees were represented by the Union, there is no credible evidence that Scott actively engaged in protected activity prior to his discharge. According to his testimony the only thing he ever did related to the Union was obtaining a copy of the collective-bargaining agreement from Parrish sometime in August 1991. He also claimed to have told Dale Frederick how he could get information about the Union while they were working together on a jobsite in New York, but told Frederick that he wanted ''to be kept out of it.'' The testimony of Frederick establishes only that he and Scott had discussed getting a copy of the contract from Parrish after Scott got one. Although Scott testified that he got a copy of the contract in August, Frederick testified that he never saw a copy until he got one from Parrish in October, indicating that Scott did not even go so far as to show Frederick his copy of the contract.

Apparently recognizing that his minimal activity relating to the Union could not reasonably have made him a target for threats and retaliation by the Respondent and that there was no evidence of any kind that the Respondent was aware of his activity, in his testimony, Scott attempted to ally himself with Frederick, the employee who had contacted the Union and generated the grievance over the alleged failure to comply with the contract and who informed the Respondent of his activities at the December 13 meeting. In addition to his testimony about Tournaud's criticizing him for assisting Frederick at the grievance meeting in December, Scott also claimed that in November, shortly before his termi-

nation, while working in Florida with employee Keith Bolton, they were signaled on a company pager. Bolton called the office from a pay phone at a rest stop and spoke with Tournaud while Scott was standing beside him. When Bolton got off the phone he told Scott the best thing he could do was stop giving Frederick information about the Union. He went on to testify that this was not in fact a message from Tournaud, but Bolton's own advice to him and that what Bolton did relay to him from Tournaud was the statement that ''heads were going to roll.'' I find that Scott's testimony about these incidents was fabricated. His testimony was incredible, self-serving in the extreme, completely lacking in corroboration, and refuted by credible testimony and documentary evidence.

I find it incredible that Scott claims to have asked Cowell, during the conversation in which he was informed of his termination, if it was related to the turmoil the Company was having with Frederick and the Union. At that point, Frederick had not identified himself as the instigator of the grievance over noncompliance with the contract and there was nothing to suggest that the Company suspected he was involved. Yet Scott, who was allegedly so fearful of company retaliation that he didn't want anyone to know he had discussed the contract with Frederick, blithely referred to Frederick as the source of the union turmoil in a conversation with a supervisor. The credible testimony of Cowell was that Scott asked if his termination was ''because of the union activity,'' but did not mention Frederick. The two incidents in which Scott claims he was threatened by Tournaud for assisting Frederick were witnessed by third parties, but neither corroborated his testimony. Keith Bolton was called as a witness by the Respondent and testified about the telephone call to Tournaud from the rest stop in Florida. Bolton credibly testified that Tournaud did not mention Scott or Frederick during the conversation and did not say that ''heads would roll.'' Tournaud denied talking to Scott about Frederick and/or the Union and telling him he would be required to write a letter of apology in order to be reinstated. Union President Jesse Parrish was present throughout the grievance meetings on December 9 and testified in detail about what transpired. He made no mention of any statements by Tournaud indicating that he was unhappy with Scott for giving Frederick information about the Union, telling him it would behoove him not to do so, or requiring Scott to write a letter of apology which would make an example of him and help put a stop to the union activity at the Company.[5] It strains credulity that Tournaud would make such statements in front of a union official, but even more so that Parrish would not remember them or refer to them in his testimony. A letter that Parrish wrote to a CWA official on December 12 concerning arbitration of Scott's grievance, which summarizes the grievance proceedings, is in evidence and it makes no mention of any such statements or demands by Tournaud.

I find that the evidence fails to establish that Scott had engaged in any significant protected activity prior to his termination or that the Respondent had any knowledge of any such activity on his part, specifically, any knowledge that he had given Frederick information concerning the Union. It also fails to establish or support an inference that protected activity on the part of Scott or any other employee was a consideration in its decision to discipline Scott. Despite the evidence that other employees had used company vans while on vacation or for other personal use, there was nothing to establish that the Respondent had ever knowingly condoned the kind of use Scott engaged in or that he had reason to believe it was authorized. On the contrary, Keith Bolton credibly testified that prior to going on his vacation Scott commented to him that he knew he wasn't supposed to take the van on vacation but that the Company wouldn't know where the van was and the only way he could get in trouble was if he wrecked it. Scott's actions prior to going on vacation were consistent with that view. Although he seemed to imply that he had no choice but to take the van with him because there was valuable equipment in it and the other company employees working in Florida wouldn't take care of it for him, I did not believe him. It is undisputed that he made no effort to contact any supervisor in Nashville to obtain permission to take the van to South Carolina or to arrange for it or the equipment to be taken by the employees in Florida. While he claimed he did not contact his immediate supervisor, Cowell, prior to leaving because he was on vacation, Scott contacted him at home on Saturday immediately after he had the accident. Prior to leaving Florida, he spoke by telephone with Ricky Nelson, under whose supervision he said he was working that week, to tell him that the job was completed. He said that he mentioned that he was leaving for South Carolina and Nelson told him to have a good time. He also said he told Nelson that he was driving to South Carolina but did not tell him he was driving a company van and there was no discussion about the use of the van or the equipment he had in it.[6] Nelson, in his testimony about this conversation, testified that he was not Scott's supervisor but did ''troubleshooting'' with any employee that needed assistance, that Cowell was present at the Teldata facility at the time of the conversation, but that he did not remember if Scott spoke to him. Cowell testified that storage of equipment should not have been a problem because the Company had several storage facilities available in Florida. He also testified that while he knew that Scott was scheduled to go on vacation he did not know where Scott was going and did not know where he was until Scott called him to report the accident.

Cowell testified that when he spoke to Scott on the Saturday of the accident, he told him to send in the accident reports to the accounting manager and to call him on Monday to discuss the situation. When Scott called on Monday, Cowell was at lunch. The accounting manager told Scott to call back, but he did not do so. When Cowell finally heard from Scott a week later, he informed him that he was discharged for unauthorized use of a company vehicle, taking it 750 miles from where it was supposed to be without permission. Cowell credibly denied having any knowledge of any union activity on Scott's part before terminating him. He

[5] The alleged requirement that Scott sign a letter of apology and help put a stop to the union activity among the employees was apparently conjured up by Scott to offset the undeniable fact that the Respondent expressed its willingness to reinstate him.

[6] Further undermining Scott's credibility was the testimony of Nelson that, at the grievance meeting in December, Scott claimed that Nelson had given him permission to take the van to Myrtle Beach. Nelson credibly denied doing so.

also testified that before making his decision he checked with Nelson to be sure that he had not given Scott permission to take the van on the trip to South Carolina.

It is clear that an employer can discharge an employee for a good reason, a bad reason, or no reason at all so long as it does not do so for an unlawful reason. *Wright Line*, supra at 1084. There is evidence here that prior to November the Respondent had a kind of ''don't ask, don't tell'' policy with respect to personal use of company vans by out-of-town employees. They were permitted a certain amount of latitude in using the vans during nonworking hours and weekends but it was not unlimited. The evidence indicates that Scott understood that he was going beyond what was considered reasonable in taking the van from Florida to Myrtle Beach, South Carolina, but as he stated to Bolton, it was unlikely that the Respondent would ever find out about it unless he had a wreck. Unfortunately for him, that is exactly what happened. Not only did Scott have an accident, he ignored his supervisor's instructions to contact him to discuss the situation the following Monday and remained out of touch for another week while driving the van to his home in Louisiana. While the Respondent may have acted harshly in discharging him (as its later offer to reduce the discipline to a suspension appears to indicate), it was not totally unreasonable or unjustified in doing so.[7] While the fact that this discharge came within a month of the first indications of employee unhappiness with the Respondent's failure to fully comply with the terms of the contract might raise some suspicion, suspicion alone does not prove a violation of the Act. *Raysel-Ide, Inc*., 284 NLRB 879, 880 (1987). I find there is a complete lack of credible evidence that the Respondent had knowledge of any union or other protected activity on Scott's part; thus, there is no reasonable basis on which to conclude that he was discharged for engaging in such activities. I also find that the credible evidence fails to establish Tournaud made the threats attributed to him by Scott, either through Bolton in a telephone call in November or in person at the grievance meetings on December 9. Accordingly, I shall recommend that all of these allegations be dismissed.

3. Dale Frederick

Dale Frederick was employed by the Respondent for 9-1/2 years as an installer of telephone systems. He worked out of town approximately 95 percent of the time. Frederick testified that within 6 months of his employment with the Respondent he was given a union identification card by Tournaud who told him that the Company was not ''union'' and that he should show the card if he needed to at jobsites. Frederick said that during the first 9 years of his employment he never had any union dues deducted from his pay, he was never contacted by nor received any communications from any representative of the Union, he never received a copy nor participated in the ratification of any contract between the Respondent and the Union, and never heard that there was a union steward at the Company.

Frederick testified that he got a copy of the contract in October. As noted above, once he read the contract and discussed it with other employees, they felt that they were not getting all of the benefits it provided. This led to their contacting Parrish who filed the grievance. At the employees' meeting on December 13, Frederick informed Griffin that he was one of the employees who had contacted the Union. It was on the Monday following that meeting that Frederick had the telephone conversation in which Cowell tried to dissuade him from filing additional grievances.

On January 21, 1993, while working in Minneapolis, Frederick was informed by Cowell that he should return to Nashville. When he arrived at the company office on January 23, he met with Cowell and Tournaud. Cowell showed him a five-page list of telephone charges and told him that he was being terminated for unauthorized personal use of his company credit card. The Respondent issued a written reprimand to Frederick, dated January 3, 1992, for excessive personal use of his telephone credit card during the months of August, September, and October 1991. The reprimand states that Frederick had an average of $96 in calls for those months. It also states that the contract limits such calls to $6 per week and that only employees who exceeded $60 per month were being reprimanded. Frederick testified that the reprimand was sent to his home in Michigan, that it was received on January 18, and that he did not see it until after his discharge.

Tournaud testified that he had heard rumors or hearsay in November and December 1991 that Frederick was one of the employees concerned about the Respondent's contract compliance. Nelson testified that on several occasions during that time period he heard Tournaud talk about employees who were attempting to enforce the contract. On one of those occasions, Tournaud referred to Frederick as an instigator of the employees and said, ''Dale would be history.'' He also heard Tournaud say that the employees should not complain because they didn't pay union dues. Nelson also testified that around the same time he heard Cowell say in reference to Frederick, ''I can't help him, he's gone to the union, his days are numbered.''

Cowell testified that he made the recommendation that Frederick be terminated because he was guilty of a flagrant violation of the Respondent's new policy prohibiting using company telephone credit cards for personal calls. He examined the Company's credit card bill which ran through December 28 and determined that Frederick had charged $57.16 in personal calls during the period covered by that bill. Cowell testified that it was obvious to him that Frederick was aware of the new policy because he complied with it by claiming the $6 allowance provided in the contract on his expense voucher for the week ended November 22, the first week the new policy was in effect. The following week he did not claim the $6 allowance and charged personal calls on the credit card. Thereafter, he used the credit card for personal calls but continued to claim the $6 weekly allowance for calls on his expense vouchers for the weeks ended January 5, 12, and 19, 1992. According to Cowell, the amount of the personal calls Frederick charged on the credit card was totally irrelevant. It was the fact that he understood the policy and then flagrantly violated it that led him to recommend termination, the only disciplinary option he considered.

[7] It appears that Scott exaggerated the length of the suspension, claiming it amounted to 7 weeks without pay. The evidence shows he would have been suspended a maximum of 4-1/2 weeks, from November 30, 1991, to January 2, 1992.

Analysis and Conclusions

I credit the testimony of Nelson, who was a believable and persuasive witness, over the denials by Cowell and Tournaud that they had stated that the fact Frederick had gone to the Union meant he was ''history'' and beyond help. While Nelson candidly admitted he was a good friend of Frederick, as a supervisor still in the Respondent's employ at the time of his testimony, there is simply no reason to believe that he would fabricate testimony against his employer's interests no matter how strong their friendship may have been. *Harrah's Marina Hotel & Casino*, 296 NLRB 1116, 1118 (1989). This testimony indicates that the Respondent had decided to get rid of Frederick, that his alleged violation of the credit card policy was the first excuse it had to do so, and that its reliance on it was a pretext. The Board requires an analysis of the evidence under *Wright Line*, supra, even where the employer's reasons for its actions are found to be pretextual. *Bridgeway Oldsmobile*, 281 NLRB 1246 fn. 2 (1986); *Jefferson Electric Co*., 271 NLRB 1089, 1090 (1984).

I find the evidence clearly supports the inference that Frederick's protected activity was a motivating factor in the Respondent's decisions to reprimand and to terminate him. There is ample evidence of union animus on its part. The fact that the disciplinary actions followed almost immediately after Frederick informed the Respondent's president that he was responsible for going to the Union about its failure to comply with the contract is persuasive evidence that his protected activity and the disciplinary actions taken against him were related. *Limestone Apparel Corp*., supra. The fact that Frederick had openly avowed his support for the Union in a meeting at which all employees were present made him a likely target for retaliation.

I also find that the Respondent has not proved that it would have taken the same action in the absence of protected activity on Frederick's part. Although Cowell testified that his investigation involved checking on the calls in order to assure himself that the calls were personal and not business-related, he never talked to Frederick about them before the decision was made to terminate him. The Board has considered an employer's failure to provide employees with specific information concerning their alleged misconduct or to afford them an opportunity to explain their actions to be significant factors in findings of discriminatory motivation. E.g., *Burger King Corp*., 279 NLRB 227, 239 (1986); *Syncro Corp*., 234 NLRB 550, 551 (1978). This is particularly true here where a long-time employee with no history of disciplinary problems is summarily dismissed. Among those which Cowell considered personal were calls to Nelson and to one of the Respondent's Florida jobsites. He said he contacted Nelson and Keith Bolton, who was at the Florida jobsite, about these calls in order to determine if the were business-related or personal but not Frederick. I find the Respondent's approach more consistent with fulfilling its prophesy, that because Frederick had gone to the Union he was ''history,'' than with an even-handed effort to find out if Frederick had violated its credit card policy and, if so, whether he had an explanation for doing so. It is also in stark contrast to its treatment of other employees.

Employees Jim Quinn and Scott Burr each made a personal call to his respective residence and charged it to his company credit card after the new policy was announced. According to Cowell, they were ''under the impression'' that they could do so. He learned this ''by discussing it with them.'' They were given warnings and no further disciplinary action was taken. Quinn had spoken out against the Union at the employees' meeting on December 13. Cowell testified that an employee named Green had also charged a personal call to his credit card. He was given a warning and asked to pay the cost of the call as Cowell determined after discussing it with him that ''it was a mistake.''

It also appears that Frederick was the only employee whose calls Cowell checked out by calling the numbers listed on the bill in order to determine if they were personal calls. When questioned about Frederick's calls, Cowell said that there was no need for any employee to contact another employee at a different jobsite as Frederick had apparently done; therefore, the call was ''personal.'' When questioned about calls placed by employee Kerry Bolton from one Florida jobsite to another, Cowell said he had no reason to investigate them because ''everyone knew that was business related.'' Burr made calls to a supervisor's home after business hours and unlike Frederick's calls to Supervisor Nelson, Cowell found it unnecessary to investigate the purpose of these calls. Burr called a jobsite in Columbus, Ohio, from the jobsite where he was working in Grand Rapids, Michigan. According to Cowell, ''that's not unusual'' and he presumed it was business and made no investigation of the call. On December 11, Danny Smith charged a call from his home in Tennessee to a location in the State of Washington. Cowell could not recall if he investigated that call. Between December 9 and 11, employee Thierry Goavec charged eight calls to numbers in Nashville, Seattle, and Cedar Rapids, Iowa, from Dubuque, Iowa. Cowell said the Nashville calls were all business calls but he had no explanation for the Seattle calls and could not remember if he investigated them. Cowell was asked about calls charged by Quinn and Burr on a bill received after they had been given warnings for charging personal calls in January 1992. Several calls were made after working hours but Cowell said he could not say if he had investigated these calls or if he had talked to the employees about them. He gave the same response when questioned about other calls by Bolton and Goavec. The evidence indicates that Frederick's calls were singled out for closer scutiny than any other employee and that once he was terminated, Cowell stopped routinely investigating employees' telephone charges.

There was evidence that the Respondent discharged employee Mark Foster in December 1991 for violating its previous policy concerning credit card use. According to Cowell, Foster had intentionally violated the policy by allowing other people to use his card number. However, Foster had been found to have committed a similar violation 2 years earlier when he let his mother and sister use his card. At that time, Cowell had removed his card, but he continued to work for the Respondent. In December 1991, Cowell ''sat him down'' and ''went through the scenario'' with Foster, who admitted to the unauthorized charges, before he was discharged. Unlike Foster, Frederick not only did not get a second chance after having been found by Cowell to have intentionally violated the Respondent's policy, he did not get a chance to go through the scenario before being fired. All of this disparate treatment constitutes evidence of discriminatory motivation. *Aratex Services*, 300 NLRB 115, 126–127 (1990); *P.B. & S. Chemical Co*., 300 NLRB 764, 770 (1990).

I find that the Respondent has not established that it would have taken the same action in discharging Frederick in the absence of protected activity on his part. On the contrary, the evidence as a whole convinces me that the Respondent decided to make an example of Frederick for having the temerity to insist that it honor all of the terms of the collective-bargaining agreement it had agreed to. This clearly incensed its top management which seized on the first opportunity available to punish him for doing so. I have given no consideration to the evidence offered by the Respondent concerning Frederick's alleged falsification of a payroll timesheet because the Respondent has admitted that it had no knowledge of this matter when it made its decision to discharge him and did not enter into its considerations. The only issue here is its motivation at the time it made its decision. I find that the discharge was motivated by union animus and violated Section 8(a)(3).

I also find that the warning given Frederick, dated January 3, 1992, for excessive personal telephone credit card charges arose out of the Union's raising the issue of noncompliance with the contract in October 1991. The Respondent had permitted the employees to use their cards for personal calls for an extended period without regard to the provisions of the contract. I have found that its change in it telephone credit card and other policies following the Union's grievance in October was intended to retaliate against its employees in violation of the Act. This warning was a direct result of those unlawful changes and violated Section 8(a)(3).

4. Russell Anderson

Anderson was employed by the Respondent from April 1990 until he resigned in May 1992. He testified that he was hired to do installation and repair work for customers in the Nashville area and at the time he was hired the possibility of out-of-town work was not discussed. He testified that he was 1 of 4 employees who worked in the Nashville area, while between 20 and 30 worked out of town primarily on Target Stores installations. He said that on two occasions he had worked on out-of-town jobs of 2 days or less and that in October 1990 he was assigned to an installation job in Chicago which lasted for 4 weeks and later required another week. At the time he was given that assignment, Supervisor Jeff Looney told him that a regular out-of-town employee, Thierry Goavec, had been injured and he was needed as a replacement.

Following the December 13 meeting at which the Respondent implemented certain changes in policy affecting local employees, Anderson and employee Mike Brown filed a grievance. A meeting was held on the grievance at the Respondent's facility on January 17, 1992. Tournaud represented the Company and Parrish was present with Anderson and Brown. Tournaud asked Parrish whether Brown was a member of the Union. Parrish responded that it did not matter, but Tournaud insisted that if Brown was not a member of the Union the contract did not apply to him and he had no right to file a grievance. Tournaud contended that Brown could not be a member of the Union because he was not having dues deducted; however, it was explained that Brown had paid his dues directly to the Union, not by payroll deduction. The grievance was denied and no further action has been taken on it.

Anderson testified that on February 14, 1992, he was contacted by employee Art Lofton and told that Cowell had asked him to tell Anderson that he was being assigned to an out-of-town job the following week. When he reported for work on Monday, February 17, Cowell told him he would be doing a job in the Minneapolis area that would last several weeks. Anderson protested that such an assignment would interfere with his child visitation obligations which required him to be in Atlanta once a month and that when he was hired it was with the understanding that he would do local service which would enable him to meet those obligations. Cowell responded that the Company could not cater to everyone's personal life and that there was nothing he could do about it. They discussed the fact that the job involved entry-level work pulling cable and Cowell expressed dissatisfaction with having to do the job at Anderson's higher rate of pay but that he had no choice. Anderson asked if he was going to be provided with a paid trip home after 3 weeks and Cowell said he would have to ask Tournaud to whom all union matters were being directed. Anderson expressed his displeasure about being sent out of town to Tournaud who said nothing could be done about it. When he asked if he would be provided a paid trip home after 3 weeks as provided in the contract, Tournaud said he could not afford to do that. When Anderson asked about it again prior to his third weekend in Minneapolis, which was his weekend for child visitation, Tournaud told him he could drive home in a company van. When Anderson said he could not do so in a weekend, Tournaud told him to take personal time off.

Anderson asked Lofton for time off to take care of personal business before leaving town the next day and was told to go ahead and do what he needed to do and then come back. He took off until about 1 p.m. and then returned to work. A week later, while he was in Minneapolis, Anderson had a telephone conversation with Lofton who told him the Respondent was questioning the time Anderson had taken off on February 17 and that he should report it as personal time off, which he did.

Anderson filed a grievance over being required to work out of town and not being given a paid trip home on the third weekend. In a discussion about the grievance on March 23, 1992, Tournaud asked him if he liked working there. Anderson responded that he liked working on local service but did not like travelling. Tournaud said that local service jobs no longer existed and if he wanted to work he would have to work out of town and if he would not do so he would be laid off.

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) by assigning Anderson to more onerous work by assigning him to an out-of-town job for an extended period, by refusing to give him paid time off to prepare for the trip, and by refusing to provide him with a paid trip home after his third week away because he had engaged in protected activity. It also alleges that Tournaud's remarks to Brown at the January 17, 1992 grievance meeting violated Section 8(a)(1).

Analysis and Conclusions

Anderson had learned about the existence of the contract in March or April when he asked Cowell about a raise and was told that raises would be in conjunction with the union

contract. Thereafter, he contacted Parrish and got a copy of the contract. In May or June, he learned that that the Respondent was instituting a drug testing policy and so informed Parrish who contacted Tournaud informed him it was a mandatory subject for bargaining. They subsequently met and negotiated a drug testing policy. During their negotiations, Tournaud asked Parrish if Anderson ''had instigated all this shit.'' Parrish refused to tell Tournaud who had contacted him but later said he was thinking of appointing Anderson as a steward. Tournaud said that he would not deal with Anderson and ''would fire his ass.'' After the policy was negotiated, Anderson was called to Tournaud's office where Cowell was also present. Tournaud asked if he had solicited funds from any employees to obtain counsel to fight the drug policy and if he told anyone not to sign the waiver form. When Anderson said he had done neither, Tournaud said that if he had said yes to either question he would be showing Anderson the door. At the end of their conversation Tournaud said that if Anderson were observed talking about the Union or talking about the Company in a derogatory manner, he would be ''terminated on the spot.'' The foregoing is based on the credible testimony of Anderson and Parrish. Tournaud admitted having the conversation with Anderson and his testimony does not really contradict Anderson's as to what was said.

Although the actions concerning Anderson involved here did not occur until some months later, it was shortly after the Respondent had changed several of its policies in retaliation for the employees' union activity and Anderson had filed a grievance over those changes. Also, it was only weeks after it had unlawfully terminated Frederick because of protected activity. The Respondent was aware of Anderson's reluctance to work out of town and that it would cause him a hardship to do so. I find the evidence of the Respondent's union animus and its animus toward Anderson, personally, for engaging in protected activity is sufficient to create an inference that the out-of-town assignment Anderson was given in February 1992 was in retaliation for that activity.

The Respondent appears to contend that it was not out of the ordinary or more onerous for Anderson to be given this out-of-town assignment. However, his credible and uncontradicted testimony establishes that he was hired to do local service in the Nashville area and in nearly 2 years on the job he had only once been given an extended out-of-town assignment and that was on an emergency basis due to an injury to the employee who would have otherwise done it. The evidence offered by the Respondent on this issue was the self-serving testimony of Cowell that there was work for Anderson in Minneapolis and none available in the Nashville area. He also claimed to have told Anderson that he would have to work on out-of-town jobs 2 to 3 weeks prior to his receiving the Minneapolis assignment. Based on their demeanor while testifying and the content of their testimony, I found Anderson to be a more credible witness than Cowell. I credit Anderson's testimony that he first spoke to Cowell about out-of-town work after he was given the Minneapolis assignment. The Respondent presumably has business records showing the work it had during February and March 1992 but produced none to support its contention that there was no work available for Anderson in the Nashville area at that time. Under *Wright Line*, supra, the burden was on the Respondent to establish that it would have taken same action with respect to Anderson even in the absence of protected activity on the part of its employees. I find that it has not met that burden and that its assigning Anderson more onerous work was discriminatory and violated Section 8(a)(3) of the Act. *Yerger Trucking*, 307 NLRB 567, 572 (1992); *Laminates Unlimited*, 292 NLRB 595, 599–600 (1989).

I find that the Respondent's alleged failure to grant Anderson paid time off on February 17 in order to take care of personal business before leaving for the Minneapolis assignment was not unlawful. Despite Anderson's credible testimony that on one other occasion when he had been given a brief out-of-town assignment in Indianapolis he was allowed a 2 or 3 hours off to get ready and was paid for those hours, I do not find that the evidence establishes that it was a routine practice. In that instance, Anderson was told by Lofton around lunchtime that he had to be in Indianapolis the next morning and that he should get his things together and go. In the present case, Anderson was informed by Lofton on the previous Friday that he would be sent out of town during the following week and, unlike the Indianapolis trip, he had the weekend to take care of personal matters. It does not appear that Lofton was a supervisor with authority to grant Anderson time off or that any supervisor was aware of or concurred in Anderson's taking time off in either instance.

I also find that the evidence does not establish that the Respondent's failure to provide Anderson with airfare for a trip to Nashville on the third weekend of his Minneapolis assignment was discriminatory. While there was some anecdotal evidence that on occasions employees had been allowed to fly to and from Nashville during long-term out-of-town assignments at company expense, it does not appear that it was an established practice that every employee was provided such a trip on the third weekend of such assignments, notwithstanding the ostensible language of paragraph 12.7 of the contract. On the contrary, the evidence suggests that requests for such trips were handled by the employees' supervisors on a case-by-case basis and that sometimes the reimbursement for such a trip was provided by a supervisor in a less than forthright manner, such as, allowing the employee to claim overtime in an amount equal to the airfare. There is no evidence that Tournaud, who refused to provide Anderson with airfare for such a trip, had acted differently in other cases. The evidence indicates the Tournaud and the Respondent contended that paragraph 12.7 had to be read in conjunction with paragraph 12.9, which they interpreted as not requiring that it pay more than the per diem it would otherwise incur if the employee spent the weekend on the road. Regardless of the merits of that position, there is no evidence that it was formulated in order to discriminate against Anderson or that it was related to the employees' union activity. I shall recommend that both of these allegations be dismissed.

I find that Tournaud's erroneous remark that Brown could not file a grievance and be represented by the Union if he was not a member was not coercive under the circumstances presented here. The remark was made at the beginning of the grievance meeting, it was immediately challenged by Parrish, the union official who was there to and did proceed to represent Brown on the grievance.

D. *The 8(a)(1) and (2) Allegations*

The complaint alleges that the Respondent violated Section 8(a)(1) and (2) by paying its employees' union dues for them

from 1979 through December 1991 and by reason of Tournaud's telling employees on December 13 that they had to join the Union in order to get three additional holidays and to work on certain jobsites. There is no dispute but that throughout that period the Respondent paid the union dues out of its own funds and that they were not deducted from the employees' wages. These dues payments violated Section 8(a)(1) and (2) of the Act. *Sweater Bee By Banff, Ltd*., 197 NLRB 805 (1972).[8] I have already found that Tournaud's remarks violated Section 8(a)(1).

E. *The Bargaining Relationship*

Counsel for the General Counsel contends that as a remedy for the Respondent's 8(a)(2) violations it should be ordered to withdraw recognition from the Union as the collective-bargaining representative of its employees. In the event that such a remedy is found not to be appropriate, the complaint alleges that the Respondent made certain unilateral changes in conditions of employment in violation of Section 8(a)(1) and (5).

The situation concerning the bargaining relationship between the Respondent and the Union is unusual to say the least. The evidence indicates that although they have negotiated a series of contracts, no employee has ever been involved in the negotiations, there has never been a union steward, and there were no grievances filed prior to October 1991. Some employees testified that they had never been asked to ratify a contract and that prior to 1991 they had never seen a contract. As has been discussed above, the employees were given union identification cards by supervisors which they were told were to be shown at jobsites if they were challenged but all union dues were paid by the Respondent. The testimony of Parrish was that in 1979 he was contacted by someone at what was then known as JLC Corporation. He said it might have been Company President Frank Porter, but he was not sure. Thereafter, a vote was conducted among the employees at the company premises by an attorney for the CWA. Parrish was present but was not in the area where the vote was conducted. The vote was six to four in favor of representation and Parrish sat down and negotiated a contract with Tournaud. Subsequent contracts were negotiated with Tournaud by Parrish and another CWA representative. Tournaud testified that the 1979 vote on representation took place at the union hall, that contracts were initially negotiated by someone other than himself, possibly, Company President John Mennen. Sometime later he took over negotiating for the Company. Tournaud said that once a contract was agreed to it was distributed directly to employees by the Union except in cases when the Union did not know where to send them. He also testified that he had once discussed appointment of a union steward with Parrish and was told that he could not find anyone that was interested in being a steward. Cowell, who was a bargaining unit employee at the time, testified that in 1979 he and other employees contacted Parrish about obtaining representation by the Union because they felt it was necessary to enable them to work on certain union jobs the Company was doing in California, which otherwise would be subcontracted. However, according to his recollection the first vote he participated in was on whether to approve a contract the Employer and the Union had negotiated and was held within 2 weeks of their first contact with Parrish. Cowell said that he was not involved in the negotiations but gave Parrish input concerning modifications to the basic CWA contact which were needed to meet their situation.

[8] See *Christopher Street Corp*., 286 NLRB 253, 256 (1987).

Analysis and Conclusions

I find there is insufficient evidence to establish that the Respondent was the moving force behind the effort to obtain union representation in 1979. Although Parrish testified that Company President Porter may have been the one who initially contacted him, Cowell whose recollection of the events appeared better than Parrish's testified that he and other employees were responsible for contacting the Union and that Porter was not involved with the Company in 1979. He also provided believable testimony that the reason the employees wanted union representation was to enable them to gain access to certain union jobsites.[9] While this side effect of representation might also have proved beneficial to the Respondent, there is no credible evidence that it instigated or had any influence on the employees' decision to seek representation by the Union.[10] There is no evidence that the Union was not chosen by a majority of the unit employees in 1979 or that they were coerced into doing so.

Although the Respondent had always paid the employees' union dues from its own funds there is no evidence that the Union had knowledge that it was doing so at any time prior to late 1991.[11] There is also nothing to suggest that the contracts between the parties were not the results of good-faith, arm's-length negotiations. While there was little activity by the Union apart from contract negotiations during the years prior to 1991, this may well have been because the majority of the employees were normally working out of town and they were receiving benefits over and above those provided in the contract. In those instances where the employees sought its assistance, as in the case of the drug-testing proposal and the grievances in late 1991, the Union promptly acted to represent the employees' interests and there is no evidence that it was dominated or influenced by the Respondent. I find there is no basis on which to order the Respondent to withdraw recognition from the Union.

F. *The 8(a)(1) and (5) Allegations*

As the exclusive collective-bargaining representative of the Respondent's employees, the Union was entitled to notice and the opportunity for bargaining before the Respondent made any changes in working conditions. On December 13, the Respondent issued a new employee handbook and announced and effectuated changes in working conditions by

[9] Although Cowell testified that the vote he participated in was to ratify a contract, I do not find that inconsistent with his testimony about how representation came about. His testimony came more than 12 years after the events took place.

[10] Griffin testified that it was his understanding that the Company paid the employees' dues because they were asked to join the Union in order to gain access to union-controlled projects. He was not associated with the Company at the time the Union began representing the employees and the basis for his understanding was not explored. I credit Cowell's testimony that it was the employees who decided to seek representation by the Union.

[11] The contract contained a provision concerning payroll deduction of union dues.

withdrawing the use of company vans by local employees for commuting to and from work, withdrawing the option of out-of-town employees to claim actual expenses in lieu of per diem, and eliminating on-call bonus pay for local employees. The evidence establishes that it did not notify or give the Union the opportunity to bargain before making these changes which were material, substantial, and significant. Its actions in making these unilateral changes violated Section 8(a)(1) and (5) of the Act. E.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *Union Child Day Care Center*, 304 NLRB 517, 524 (1991); *88 Transit Lines*, 300 NLRB 177, 184 (1990). The uncontradicted testimony of Anderson established that employees who were called into work for less than 4 hours were paid only for actual hours worked rather than the 4-hour minimum called for in the contract. By failing to pay employees in accordance with the contract the Respondent violated Section 8(a)(1) and (5). *Wilson & Sons Heating*, 302 NLRB 802, 806 (1991).

The Respondent contends that the Union was given notice of its intent to make a change in its telephone credit policy and waived the opportunity to bargain. As discussed above, for a long time prior to November 1991 the Respondent had permitted out-of-town employees to charge to their company credit cards $40 or more of personal telephone calls each month. The contract provided for an allowance of $6 per week for such calls. Griffin testified that during October he was astounded when he learned of the volume of calls that employees were charging to the Company. He said that at the grievance meeting on November 1 he mentioned this to Parrish and told him that the contract specified $6 per week and that was what the Company was going to do. Tournaud testified that Parrish was told that because of abuse they were eliminating the employees' use of company credit cards for personal calls. He said Parrish responded ''you have to do what you have to do, you can't let people steal from you.'' On November 18, the new policy limiting employees to the $6-per-week telephone allowance went into effect. Parrish testified that at the meeting Griffin said that some employees had used the credit cards excessively and that they were going to look at it and see what could be done. He agreed he may have said that they had a problem and could not let people steal from the Company; however, he said that Griffin did not say what the Respondent was going to do about the problem or make any proposals. He said he was not aware that the Respondent had a policy that differed from the contract provision pertaining to telephone calls. CWA Representative Harry Swaim who was also at the meeting testified that Griffin talked about telephone credit card abuse and said they were investigating it.

I find the evidence does not establish that the Respondent put the Union on notice that it was proposing to change its telephone credit card policy. It is clear that it felt it was under no obligation to bargain about what it considered was in effect a tit-for-tat response to complaints that it was not meeting all its obligations under the contract. As Griffin told Parrish at the meeting, if they insisted that the Company honor every single item in the contract the Company would insist on the same from them. By telling the union representatives that the Company was going to insist that the employees comply with the $6-per-week telephone allowance as stated in the contract, the Respondent did not indicate that any change in working conditions was contemplated. For all that the Union knew, this was not a change but insistence on contract compliance about which it had no basis for requesting bargaining. In fact, the telephone policy the Respondent had long followed differed from and was more generous than the terms of the contract and could not be unilaterally changed. The evidence does not establish that on November 1 the Respondent put the Union on notice as to what the actual policy was. Consequently, I find that it did not give the Union notice or an opportunity for bargaining before it changed its telephone credit card policy, effective November 18. Its failure to do so violated Section 8(a)(1) and (5).

The discharge of Dale Frederick discussed above was based solely on his alleged violation of the Respondent's new policy concerning telephone credit card use.[12] Inasmuch as the institution of this new policy was unlawfully motivated by union animus in violation of Section 8(a)(3) and implemented unilaterally in violation of Section 8(a)(5), any disciplinary action taken pursuant to it was also unlawful. *Equitable Gas Co.*, 303 NLRB 925, 927–929 (1991); *Great Western Produce*, 299 NLRB 1004, 1005 (1990).

CONCLUSIONS OF LAW

1. The Respondent, Tel Data Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All apprentices, wiremen, installer-repairmen and senior installer-repairmen, and excluding others and those exempted under the National Labor Relations Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union is the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act:

(a) By telling employees that they would lose benefits because they had insisted that the Employer comply with all provisions of the collective-bargaining agreement.

(b) By telling employees that the Employer could close its business and fire them because they had engaged in protected activity.

(c) By telling employees they would receive three additional holidays and would be able to work on certain jobsites only if they joined the Union.

(d) By promising an employee benefits if he ceased engaging in protected activity.

6. The Respondent violated Section 8(a)(1) and (2) of the Act by paying union dues on behalf of its employees from it own funds without deducting such amounts from their wages.

7. The Respondent violated Section 8(a)(1) and (3) of the Act:

[12] The evidence establishes that the Respondent gave no consideration to whether Frederick's charges for personal calls exceeded the $40 per month allowed under it prior policy. According to Cowell, the amount involved was irrelevant and Frederick was discharged because he knew what the new policy was and flagrantly violated it.

(a) By eliminating on-call bonus pay for local employees in retaliation for the employees' having engaged in protected activity.

(b) By withdrawing from local employees the use of company vans for driving to and from work in retaliation for the employees' having engaged in protected activity.

(c) By withdrawing from out-of-town employees the option of claiming actual expenses in lieu of per diem in retaliation for the employees' having engaged in protected activity.

(d) By issuing a disciplinary warning to Dale Frederick on January 6, 1992, and discharging him on January 23, 1992, in retaliation for his having engaged in protected activity.

(e) By assigning Russell Anderson more onerous work in retaliation for his having engaged in protected activity.

8. The Respondent violated Section 8(a)(1) and (5) of the Act:

(a) By implementing material and substantial changes in policies relating to use of company telephone credit cards for personal calls, use of company vans by local employees for commuting to and from work, on-call bonus pay for local employees, and the option of out-of-town employees to claim actual expenses in lieu of per diem, without first providing the Union with notice and the opportunity for bargaining.

(b) By unilaterally failing to continue in effect the terms of the collective-bargaining agreement requiring payment to employees of a minimum of 4 hours call-in pay.

(c) By discharging Dale Frederick for allegedly violating its unlawful policy concerning use of company telephone credit cards for personal calls.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. The Respondent did not engage in any unfair labor practices alleged in the consolidated complaint which are not specifically found here.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged employee Dale Frederick, I shall recommend that it be required to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of earnings or benefits suffered by reason of the discrimination against him, plus interest. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]